SHOULD THERE BE FREEDOM OF CONTRACT.

"Every man is the master of the contract he may choose to make: and it is of the highest importance that every contract should be construed according to the intention of the contracting parties."[1] Probably this statement of Chief Justice Erle would strike any one as both sound and commonplace. Nevertheless it is believed that the statement does not accurately express the law, and that it may be as well that it does not.

Freedom of contract has been the fetish of our modern law for many years. Every judge is careful to pay his respect to the idea, and never more so than when, under an elaborate statement of words, he is about to hold a defendant to a supposed promise, which in fact was never made. The present writer has expressed himself on a former occasion as follows:

> "A man may make such lawful promise as he sees fit, and is only bound by the promise he has made. This necessarily follows because a contract is, in its nature, based upon the consent of the parties, and hence one can only be bound in contract by the promise to which he has assented."

This but expresses the general view as found in the cases and authorities, but lately it has appeared doubtful to me whether this accurately expresses the idea of contract or has done so for over one hundred years. We have started with the premise of requiring "mutual assent" as a necessary ingredient of contract and from that standpoint have concluded that principle required a consistent line of decisions logically built up therefrom. When the deviation is too apparent and flagrant we criticise, but if not we accept the deviation without hesitation and rest satisfied with the ingenious devices whereby black is shown to be white. Reference is not now made to that spirit of modern legislation brought about by popular demand, which hampers the freedom of contract and of conducting business in order that the impossible may be accomplished, but to the

[1] Clarke *v.* Watson (1865) 18 C. B. R., U. S. 278.

checks and limitations upon the freedom of contract which have been brought about by the courts themselves. And first let us turn to courts of equity to see what their activities have accomplished in this connection.

In case a man enters into a bilateral contract whereby he promises to convey land for a price it is evident that, if he is to be held on his promise he is obligated solely to convey land. If he is held to anything further it certainly is not on his promise as such. Take now the familiar cases in which equity will compel a vendor to convey even though there be some slight defect or some element which renders it impossible to carry out his promise in all its details. In compelling specific performance in such cases equity will also force the vendor to pay such sum of money as will compensate the vendee for the defect. The vendor promised to convey certain land, but did not promise to pay money in addition. If this is holding a man on a promise it certainly is not the promise he himself made.

Next come the cases involving conditions implied in law. In this class of cases the parties have shown no intent to render the contract conditional. It may be fair and just to say that in a bilateral contract for the purchase and sale of real property, where nothing has been said about the time of exchanging the deed and the purchase money, the acts are to be concurrent and mutual conditions implied. As matter of fact, however, in all these cases the courts have in reality made a new contract for the parties. It is true that in these instances the courts imply no conditions which are contrary to the express terms of the contract and so add nothing to the obligation of the promisor, but they do add defensive terms for the benefit of the promisee. The courts vigorously disclaim any idea of changing the contract of the parties and argue that by interpretation they find the intent of the parties, but this is simply a convenient fiction, and the fact remains, that absence of intent is the basis on which these rules of court rest.

We have a third class of cases in which the courts alter the contract to suit their ideas of justice, and in which express conditions are inserted in the contract and eliminated by the courts. Especially prominent examples of this are found in cases of building contracts where the

promise to pay is expressly made contingent upon the production of an architect's certificate. There the promisor is peculiarly dependent upon the fulfillment of the conditions precedent because in most cases he is ignorant of the intricacies of the building trade and on this very account protects himself by requiring that a certificate be produced from some designated expert in whose judgment he has confidence. Yet many courts will, under some circumstances entirely disregard these conditions and say that if the certificate is unreasonably withheld plaintiff may recover without it. The question of reasonableness is here one of fact, and the promisor finds himself bound by the decision of a judge or jury upon the very point which he had intended his selected expert to determine. This is unquestionably another instance in which the courts change the contracts of the parties. It will be observed that the courts here go much further than in the case of conditions implied in law because there they are in effect merely giving the promisor a defence while here they are adding to the obligation of the promisor, and holding him to a promise which he never made.

A very characteristic opinion upon this point is that of Chief Justice Beasley in Chism *v.* Schipper.[1] His comments run through the opinion in this style—"Can the defendant cheat the plaintiff by due course of law." * * * "The only known reply is, that the plaintiff has covenanted to that effect" * * *. If Justice Earle is correct in the views given at the beginning of this article, this suggested reply "that the plaintiff has covenanted to that effect" would seem to be all sufficient. It has certainly been held a sufficient answer in England in these certificate cases, and logic must certainly lead one to that conclusion.

From this standpoint, the tendency of the courts of New York and of some other states to refuse in some cases enforcement of express conditions, unless the breach goes to the essence, is fairly open to criticism. These decisions cannot be defended successfully if every man is "the master of the contract he may choose to make." But is that true or is it desirable that it should be so?

[1] (1888) 51 N. J. L. 1.

In view of the broad field covered by the three classes of cases mentioned above, it seems reasonable to say that such is not the fact, and should not be. Certainly the application of conditions implied in law is most advantageous and equity's rules as to specific performance with compensation, although not as general in application, are a distinct advantage to the law. Why then should we condemn the further change as regards express conditions? We say, there is the plain language, how can we avoid that? But the courts just as truly avoid the language in the other instances, and if the courts may beneficially interfere in some cases, why not in others?

The subject of contract is still growing. Many of its principles are undeveloped and crude. This gradual growth is changing preconceived views, and the student or writer of this subject must grow with it or be left hopelessly behind. To most lawyers it seems axiomatic to say that in our system of law every simple promise must be supported by a consideration. Probably that is so, but how far has that advanced us? What is this so-called consideration? If Dean Ames is right in his able and interesting articles it would seem to be a steadily decreasing something which has about reached the vanishing point. So, also, we may inquire what we mean by this universal test of mutual assent. This may be well enough expressed thus: "The first essential of a contract is mutual assent, and mutual assent means the consent of the parties to the terms of the contract, intent by both parties to enter into the proposed arrangement."

There seems no reason to change this general view, but nevertheless if too strictly and logically followed, it leads to situations which are intolerable and which the courts never have and never will strictly enforce. It is well enough for us to classify contracts as those obligations having their initiative in the intent and agreement of the parties, but when that preliminary has once taken place, there seems to be no essential reason why the courts cannot modify the obligation which thus arises, and why the mastery of a man over the contract he chooses to make should not be subject to rules and regulations applied by the courts and directly limiting the mastery of the parties.

It is true that when a man bases his promise to pay upon the judgment of an eminent architect it is a somewhat strong proposition to suggest that he shall not have such safeguard, but shall be turned over to the judgment of twelve inexperienced men. To say that this is only done when the architect unjustly or fraudulently withholds the certificate is only saying in another form that the entire question is to be settled by the jury. Courts should disregard the expressed intention of the parties only in extreme cases and with great caution, but that it is sometimes beneficial to do so seems certain. We must not make a fetish of this favorite theory of mutual assent, but recognize that the courts have regularly modified and controlled such assent and without doubt will continue to do so.

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